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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONERS

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Petitioners,

v.

BILLY DON DUNLAP,
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On Writ of Certiorari to the United States
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BRIEF OF PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reproduced as Appendix A to the Petition. (App. 1-6). It is reported at 514 F.2d 130 (1975). The Memorandum Opinion of the District Court for the Eastern District of Tennessee is reproduced as Appendix B to the Petition. (App. 7-13). It is reported at 376 F. Supp. 138 (1974).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975. The Petition for Certiorari was timely filed on July 16, 1975. The Petition was granted on October 6, 1975. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issues presented for determination are whether or not a federal court may review a military commander's decision to deny a request for re-enlistment, and whether a National Guard Technician has a protected interest in his military membership in the National Guard of a state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709(a) (Supp. 1974), provides:

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in (1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard of the armed forces.

32 U.S.C. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (2) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e)(1) (Supp. 1974) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned: (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

32 U.S.C. § 709(e)(5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned.

STATEMENT OF THE CASE

On January 11, 1974 the respondent, Billy Don Dunlap, filed a complaint against certain officers in the Tennessee Air National Guard, certain units of the Tennessee Air National Guard, the Governor of Tennessee and the State of Tennessee. (App. 19-26). The complaint asserted that it was founded upon the

due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and upon 42 U.S.C. §§ 1983, 1985(3), and 1986. The complaint also sought a judgment to declare that a commander's prerogative in respect to re-enlistment of enlisted personnel in the Tennessee Air National Guard to be unconstitutional and also sought injunctive relief to prohibit the commander of the respondent from exercising that prerogative. Basically, the respondent sought to adjudicate the fact that his commander had determined that it was not in the best interests of the Tennessee Air National Guard to allow him to re-enlist at the termination of his current period of enlistment. (On December 8, 1972, the last day of his enlistment period, the respondent had been issued orders separating him from the Tennessee Air National Guard.) In addition to being a member of the Tennessee Air National Guard, the respondent had been employed as a National Guard Technician as provided in the National Guard Technician's Act of 1968. (32 U.S.C. § 709, Act of Aug. 10, 1956, c. 1041 § 2, 70A Stat. 614; Act of Sept. 13, 1961, P.L. 87-224, § 2, 75 Stat. 496; Act of Aug. 13, 1968, P.L. 90-486, § 2(1), 82 Stat. 755; Act of Aug. 13, 1971, P.L. 92-119, § 2, 85 Stat. 340.) His employment was not unlike that involved in the case of Baum v. Zuckert, 342 F.2d 145 (6th Cir. 1955), which concerned the Air Force Reserve Technician Program. The court there noted that the program was to provide reserve units:

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full-time civilian jobs coincide with their military job." 342 F.2d 145, 146.

After termination of his enlistment, the respondent was notified that his employment as a National Guard Technician would be terminated thirty days from the date of notification as he no longer met a condition of his employment; that is, maintenance

of his status as an active member of the Tennessee Air National Guard. 32 U.S.C. § 709(e)(1).

The respondent initiated the present action one year less a day from the termination of his Technician employment. The petitioners responded by filing a motion to dismiss and alternative motion for summary judgment (App. 14-18).

The United States District Court for the Eastern District of Tennessee, Robert L. Taylor, Judge, granted the petitioners' motion to dismiss with an accompanying memorandum opinion. (App. 7-13). The respondent perfected an appeal from that decision and on April 17, 1975 the United States Court of Appeals for the Sixth Circuit in an opinion authored by Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation, reversed and remanded the case to the District Court holding that ". . . decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of nonreviewability." (App. 5).

This Honorable Court granted the petition for a writ of certiorari to review that decision on October 6, 1975.

SUMMARY OF ARGUMENT

The complaint of the respondent in the instant case did not allege that his commander in refusing to accept his offer of re-enlistment in the Tennessee Air National Guard violated any statute or lawful regulation. It merely attacked regulations, without any specificity, which gave to military commanders the discretion in whether or not to accept a re-enlistment. The complaint alleged no protected interest in re-enlistment in the Tennessee Air National Guard. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v.*

Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The National Guard Technicians Act of 1968, 32 U.S.C. § 709, establishes membership in the National Guard as a requisite for employment as a National Guard Technician. The Act did not evidence any Congressional intent to create a protected interest for National Guard technicians in their National Guard membership. The position of the respondent as a federal civil servant does not give rise to a claim for preferential treatment of the respondent as a member of a state's military organization. No statute or regulation concerned created anything more than a subjective expectancy of an enlisted man in re-enlistment.

The allegations in the instant case do not warrant the courts' entry into the area of review of military decisions, an area of governmental activity in which the courts have little competence. *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). The courts should not venture into the traditional area of nonreviewability of military decisions. The litigation of the threshold question, whether or not a military decision was made for a military purpose, would have in most cases entailed the litigation of the reasons behind a military decision.

ARGUMENT

A. There Is No Protected Interest in a Re-Enlistment in the National Guard and Respondent Alleged None.

B. The National Guard Technicians Act of 1968 Do Not Create a Special Status in the National Guards of the States for the Federal Civil Servant Technician.

A. A term of enlistment, other than an original enlistment, in the Air Force National Guard may be accepted for any specified period, under regulations to be prescribed by the Secretary of the Air Force. 32 U.S.C. § 302, Act of Aug. 10, 1956, c. 1041, 78 Stat. 601; Act of Oct. 4, 1961, P.L. 87-378, § 5(1), 75 Stat. 808. Re-enlistments, as enlistments, are founded upon a matter of contract principle. In instances where an enlistee has been defectively discharged, recovery has been granted only for the term of the contract—the termination of the enlistment involved. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971).[1] Thus, neither the National Guard, nor an enlistee are bound for a period longer than that for which each originally bargained. As the Court of Claims noted in O'Callahan:

> The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual cases. We think that he is not. The principles of efficient management,

[1] O'Callahan had claimed that as he had been illegally discharged, O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), his new discharge should not have been back dated to the end of the enlistment period, but should have been dated as of the date of his proper discharge. He had been dishonorably discharged on October 11, 1956; his enlistment expired March 8, 1961; the action changing the type of discharge granted was completed January 12, 1971, with the discharge being effective March 8, 1961. 451 F.2d 1390, 1391.

maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. 451 F.2d 1390, 1392-3.

As the respondent's term of enlistment was up, the Guard was under no responsibility or affirmative duty to allow him to re-enlist—that is, the only decision made was a negative one and Dunlap had no interest affected thereby. A mere subjective expectancy is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Congress has provided for indefinite enlistments in some cases, 32 U.S.C. § 302(b), but generally has provided for enlistments of specific periods. 32 U.S.C. § 302(a).[2] A periodic enlistment terminates by its own terms and both parties to the enlistment are given the opportunity to make a choice at that time of whether to renew their respective obligations. Neither party is bound beyond that for which he has bargained.

Enlistments in the Tennessee Air National Guard are governed by Air National Guard Manual, ANGM 39-09, "Enlisted Personnel, ENLISTMENT IN THE AIR NATIONAL GUARD AND AS A RESERVE OF THE AIR FORCE, Departments of the Army and the Air Force, National Guard

[2] 32 U.S.C. § 302. Enlistments, reenlistments, and extensions. (a) Under regulations to be prescribed by the Secretary concerned, original enlistments in the National Guard may be accepted for—(1) any specified term, not less than three years, for persons who have not served in an armed force; or (2) any specified term, not less than one year, for persons who have served in any armed force. (b) Under regulations to be prescribed by the Secretary concerned, reenlistment in the National Guard may be accepted for any specified period, or, if the person last served in one of the highest five enlisted grades, for an unspecified period. (c) Enlistments or reenlistments in the National Guard may be extended—(1) under regulations to be prescribed by the Secretary concerned, at the request of the member, for any period not less than six months; or (2) by proclamation of the President, if Congress declares an emergency, until six months after termination of that emergency.

Bureau, Washington, D.C. 20310. Chapter 2, "Instructions for Enlistment and Criteria," dated 10 September 1971 including Change 1, dated 14 March 1972, provides at paragraph 2-10 as follows:[3]

> 2-10. Terms of Enlistment. An individual who enlists in the Air National Guard must concurrently enlist as a Reserve of the Air Force in the same grade for a period equal to his Air National Guard enlistment.
>
> a. PS [prior service] personnel with no MSO [military service obligation] may be enlisted for 1, 2, 3, 4, 5, or 6 years.
>
> • • •

Paragraph 1-3a states that "[r]ecruiting and enlistment is the responsibility of the State. . . ."

In his initial complaint, the respondent alleged no right to re-enlist. There is none. He alleged no liberty interest of which he had been deprived by the decision not to accept his re-enlistment. Thus, this case falls within the purview of *Perry v. Sindermann, supra*, and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. Paraphrasing *Roth* in regard to any liberty interest which the respondent might have had, the National Guard, in declining to re-enlist the respondent, did not make any charge against him that might seriously damage his standing and association in his community. "[T]here is no suggestion whatever that the respondent's 'good name, reputation, honor or integrity' is at stake." There is no allegation that the Guard in declining to re-enlist the respondent, imposed on

[3] The provisions of Air Force regulation, AFR 35-16 dated 30 May 1975 which relate to the enlistment and reenlistment policies of the regular Air Force are not directly applicable to the Air National Guard by the Department of the Air Force, Headquarters US Air Force, Washington, D.C. 20330, ANG Regulation 0-2, dated 31 March 1975, Indexes, "Numerical Index of Applicable Administrative Publications."

him any stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities. 408 U.S. 564, 574.

In regard to property interests, this Court stated further that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. 408 U.S. 564, 577.

Again paraphrasing, the respondent has alleged no terms of his prior enlistment which would secure to him any interest in a re-enlistment for another term. The allegations have supported no possible claim of entitlement to re-enlistment. There is no alleged policy of the National Guard to secure to the respondent an interest in re-enlistment or to create any legitimate claim to re-enlistment. *Roth*, 408 U.S. 564, 578. As opposed to Sindermann, the respondent here alleged no interest in the renewal of his re-enlistment contract which might have been fostered by the National Guard. Paraphrasing *Sindermann* he has not claimed any legitimate reliance upon guidelines of the National Guard which provided that an enlisted man in his particular circumstance had some form of job tenure. He has not offered to prove that an enlisted man with his period of service had a "property" interest in continued service with the Guard. 408 U.S. 593, 600-601.

B. The petitioners respectfully submit that the Sixth Circuit Court of Appeals erroneously determined that 32 U.S.C. § 709(e)(3) modified 32 U.S.C. § 709(e)(1) and that the Adjutant General could only terminate a technician for cause. Membership in the National Guard is a requisite for employment. Failure to maintain membership in the National Guard results in a loss of technician employment by operation of law.

Traditionally, the National Guard is not a full-time active force. Its members are ordinary citizens holding regular full-time jobs, but who perform National Guard duty as required by the Governor of the State and the President. In order to be prepared for state duty and federal mobilization, National Guardsmen participate in periodic weekend drills. However, there must be provision for the full-time administration and training of the Guard as well as the maintenance and repair of equipment and the furnishing of supplies.

The reports of both the Committee on Armed Services of the House of Representatives (H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968)) and the Senate Committee on Armed Services (S. Rep. No. 1446, 90th Cong., 2d Sess. (1968)), spoke of the necessity of what were known as caretakers and clerks, now technicians. Although most of these employees were members of the National Guard, during the normal work week they were civilian state employees maintaining National Guard equipment and caring for the ongoing daily administration and supply needs of the National Guard. However, they received their salaries wholly from federal funds and were required to meet all of the mental, physical and professional qualifications for National Guard membership, under regulations prescribed by the Secretaries of the respective services.

As state employees being paid by federal funds not only was their legal status uncertain, they were ineligible for federal retirement programs and often not covered by state retirement programs. To remedy these matters, Congress enacted the National Guard Technicians Act of 1968 making these technicians federal employees, but leaving the administrative authority at the state level in recognition of the state characteristics of the National Guard.

The Act statutorily recognized previous regulation and practice which required these technicians to be members of the National Guard and to hold a military rank or grade appropriate to their civilian position.

> The concept of the full-time civilian program is that his civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized for active duty in the same unit.
>
> While the foregoing is the general practice the committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed. It is the view of the committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position.
>
> The Department of Defense has indicated its informal concurrence with that view. S. Rep. No. 1446 90th Cong. 2d Sess. 20 (1968).

Thus, it is apparent that the Congress chose to defer to the military status of a technician in requiring Guard membership. That is, the provisions of 32 U.S.C. § 709(b) require a military status of these technicians for a military reason. The provisions of 32 U.S.C. § 709(e)(3) provide for a discharge for cause from the civilian employment. The two are separate and distinct. Each was enacted for a separate purpose and each contemplated different circumstances. For example, a technician might be discharged from his technician employment for cause, although his military record would remain unblemished. A Guardsman might also be discharged from the National Guard for cause, and although his technician employment would terminate by operation of law, his civilian employment record would remain unblemished. Also, to be considered are the facts in the instant case wherein the term of enlistment of a National Guardsman had expired; his technician employment would terminate by operation of law, but neither his military nor his civilian record would be blemished.

There is nothing in the committee reports of the House or Senate and there is nothing in the statute itself which would indicate that 32 U.S.C. § 709(e)(1) and (3) should be read together to create a new kind of beast. Nothing in the National Guard Technician Act of 1968 indicates that the technicians were to be given any preferred treatment in their military status as members of the National Guard. Although the statutes provide that a state Adjutant General is the top-level supervisor of a state technician program for normal personnel purposes (32 U.S.C. § 709(e)) and save for the Governor is the commander of a state's National Guard, a subordinate commander in the military chain may or may not be a supervisor for "civilian" personnel matters. And a military commander's evaluation of the performance of his military subordinate may not coincide with a civilian supervisor's evaluation of his "civilian" subordinate—though the subordinate may be the same individual. Certainly, the intent of 32 U.S.C. § 709(b) was to defer to the requirements of the military membership, rather than to the requirements of civilian employment.

The requirements of Guard membership under subsection (b) is paramount to the civilian employment. The decision of the Court of Appeals in the instant case would make them co-equal and would create a bifurcated standard for the military which would wreak havoc with the National Guard system. The Rubicon which borders the realm of judicial nonreviewability of military discretionary decisions should not be bridged by 32 U.S.C. § 709.

The Traditional View of the Nonreviewability of Military Discretionary Decisions Should Not Be Abrogated Under the Facts of the Case at Bar.

There is no allegation in the instant case that the National Guard authorities violated military regulations or that the decision by Guard authorities was not made within the scope of their statutory and regulatory power. The petitioners have not asserted and do not assert that in either of those instances a military decision should avoid judicial scrutiny. In *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958), it was made abundantly clear that where a military authority, there the Secretary of the Army, acted outside his statutory grant of power, his action could be judicially determined to be illegal. Further, courts have not been reluctant to review matters wherein the military has violated its own regulations and have not hesitated in directing the military to comply with its own regulations where the failure to follow a regulation has resulted in prejudice. *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970). Citing *United States ex rel. Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Feliciano v. Laird*, 426 F.2d 424 (2nd Cir. 1970); *Nixon v. Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88 (9th Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1272 (5th Cir. 1970); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969). I*n Smith v. Resor*, 406 F.2d 141 (2nd Cir. 1969), the court noted that the military decisions could be reviewed in order to determine if the rights of an enlisted man under applicable statutes and regulations were violated.

The court went on to state that "purely discretionary decisions by military officials which are within their valid jurisdiction will not be reviewed by this court" citing *U.S. ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371 (2nd Cir. 1968). In *Schonbrun* the court considered the effects of the "unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces." 403 F.2d 371, 375.

When the military has been found to have acted within its statutory authority and when it has been determined that the military has acted in accord with its lawful regulations, courts have not entertained further review. Again, in the instant case there is no allegation that any of the petitioners acted in violation of their statutory authority or in violation of their own lawful regulations.

The gravamen of the complaint of the respondent in the District Court was that his commander determined not to accept his re-enlistment in order to terminate him from his employment as a National Guard Technician pursuant to 32 U.S.C. § 709(e)(1), rather than under the procedures outlined in 32 U.S.C. § 709(e)(3), (4) and (5) concerning discharges for cause. (Complaint of respondent, paragraphs 7, 14, 16; App. 21, 23.)

Therefore, the initial determination must be whether the judiciary should review an otherwise lawfully executed discretionary decision of a military commander in order to determine whether it may have been done for a non-military reason. The Court of Appeals held that decisions which are made for non-military reasons involving no application of military expertise may well be judicially reviewable. (App. 5.)

Congress is given the power under Art I, § 8, cl 16 of the Constitution:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to

the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

As the opinion of this Court stated in *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973):

> Congress has enacted appropriate legislation pursuant to Art I, § 8, cl 16, and has also authorized the President—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and the discipline of the National Guard. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. 413 U.S. 1, 6-7.

Congress itself has stated its general policy in regard to the National Guard;

> In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line of defenses of the United States be maintained and assured at all times. * * * 32 U.S.C. § 102, Act of Aug. 10, 1956, c 1041, 70A Stat. 597.

Thus, it can be seen that the Framers of the Constitution gave to the Congress the authority to prescribe discipline for the National Guard and that Congress has exercised this power and also authorized the President to prescribe regulations. State National Guard units are effectively bound by these regulations by 32 U.S.C. § 108 by which the National Guard of a state may be barred from receiving money or other aid for failure to comply with or enforce a requirement of Title 32 or regulations thereunder. Act of Aug. 10, 1956, c. 1041, 70A Stat. 600. In Tennessee, the Governor is the Commander in Chief of the military forces of the state. Tenn. Code Ann. § 7-105;[4] Article III, Sec. 5 of the Tennessee Constitution.[5]

As Commander in Chief of the Tennessee National Guard, he is authorized under Tennessee law to issue regulations for organization, government, and discipline of the Tennessee Na-

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[4] *7-105. Commander-in-chief of military forces—Powers—Regulations.*—The governor of this state shall be the commander-in-chief of the military forces, except when they shall have been called into the service of the United States, and is authorized and empowered:

(a) To issue all such orders, rules and regulations as may be necessary to provide for the organization, government, discipline, maintenance, training, and equipment of the Tennessee national guard. All such orders, rules, and regulations issued by the governor shall have the force and effect of law, but they shall conform to the laws and regulations of the United States relating to the organization, discipline, and training of the national guard, to the provisions of §§ 7-101—7-151, 7-301—7-304, 7-311—7-333, 7-401—7-410 and 7-513—7-523 and as nearly as practicable to the laws and regulations governing the U. S. Army and the U. S. Air Force.

(b) Upon the duly and legally constituted call of the president of the United States, to call into service all or any portion of the military forces of the state.

(c) To appoint, commission and determine the grade of all officers and select all warrant officers.

(d) To determine and fix the home station and location of the various units of the Tennessee national guard.

(e) To provide such buildings, facilities and grounds as may be necessary to conduct the various activities of the branches and units of the national guard.

(f) To have, exercise and enjoy such other, further and general powers with respect to the military forces, as may be necessary to execute the provisions of §§ 7-101—7-151, 7-301—7-304, 7-311—7-333, 7-401—7-410 and 7-513—7-523 or any other statute, or any constitutional provision affecting the military forces, as said statutes and constitution may now exist, or with any amendments thereto or changes therein. [Acts 1970 (Adj. S.), ch. 596, § 4.]

[5] Art. III, Sec. 5. Governor as commander-in-chief—Calling out Militia.—He shall be commander-in-chief of the Army and Navy of this State, and of the Militia, except when they shall be called into the service of the United States: But the Militia shall not be called into service except in case of rebellion or invasion, and then only when the General Assembly shall declare, by law, that the public safety requires it.

tional Guard. By statute these orders are to conform to the laws and regulations of the United States relating to the organization, discipline, and training of the National Guard and as nearly as practicable to the laws and regulations governing the U.S. Army and the U.S. Air Force. The Governor also has other, further and general powers with respect to the military forces as may be necessary to execute the provisions of the applicable statutes or any constitutional provisions relating to the military forces. Tenn. Code Ann. § 7-105(a), (f).

Therefore, it is apparent from the United States constitutional provisions, the congressional enactments pursuant thereto, the Tennessee constitutional provisions, and the statutes pursuant thereto that the military falls wholly within the realm of the legislative and executive branches of government within both sovereigns. The judiciary has traditionally shown a reluctance to review otherwise lawful decisions of the military. In *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953), this Court considered a claim of a medical doctor inducted because of his military expertise who sued to have the Army utilize him in a medical position and award him a commission or to discharge him. The doctor had claimed the Fifth Amendment privilege when questioned concerning his membership in certain "subversive" organizations. The government's position in both the District Court and the Court of Appeals was that the doctor, although drafted into the military because of his medical expertise, could be utilized in any position that his commanders saw fit. Both the lower courts agreed with the government's position. However, when the case reached this Honorable Court, the government agreed that the statutes required the doctor to be used in a medical capacity and agreed that the military had failed to so utilize him, but argued that he was not entitled to a commission and that he could be assigned to any particular duties within the medical field. This Court agreed and stated that it would not review assignments since these were peculiarly in the realm of military discretion. "It

is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief." 345 U.S. 83, 90. This Court also considered the question of whether a member of the military may obtain judicial review of his assignments to duty. The Court responded in the negative saying that, "there must be a wide latitude allowed to those in command." 345 U.S. 83, 93.

In the instant case the question is whether the discretionary decision of a military commander to allow a person to re-enlist is judicially reviewable. The petitioners submit that it is not. The language of the court in the *Orloff* decision is applicable to the present factual situation, although it might not today be applied to the facts in *Orloff*. ("This whole episode appears to me to be one of a too-rapidly increasing number to which Americans in a calmer future are not likely to point with much pride." Justice Black in dissent, 345 U.S. 83, 97.)

> We know from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled upon rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate from that of the civilian. 345 U.S. 83, 93-94.

Should the courts assume the authority to review decisions of military commanders that persons be denied the right to re-enlist such would be an unwarranted interference with the military's exercise of discretion, and military commanders might be called into court to explain their actions each time a disgruntled service member seeks to have them reviewed. As noted in *Gilligan v. Morgan*, 413 U.S. 1, 37 L.Ed.2d 407, 93 S.Ct. 2440:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; . . . 413 U.S. 1, 10.

In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Court, speaking of *Orloff* noted that courts would not review duty assignments even if discriminatorily made, where there was no question of deprivation of constitutional rights or action beyond the scope of military authority. The petitioners would submit that courts should not review non-assignments—a refusal to accept an enlistment. The Fifth Circuit in *Mindes* established certain criteria to be weighed in determining non-review of military matters. To what extent is military expertise involved: In the instant case the respondent sought to re-enlist. The decision of whether to allow an enlisted member of the Armed Services to re-enlist is a peculiarly military decision. In reaching such a determination, a commander must determine that the person had a particular military occupational specialty that would be necessary for the completion of the mission of his unit. He would of necessity have to consider the qualifications of the applicant for enlistment or re-enlistment along with the qualifications of other persons whose records indicate experience and expertise in that particular military occupational specialty.

Further, a military commander must take into consideration the effect that the enlistment or reenlistment of a particular individual would have on the morale and efficiency of his unit. None of these generally described determinations lend themselves readily to judicial review and all are peculiarly within the realm of a commander's military discretion.

What is the nature and strength of the challenge to the military determination: In the instant case the only "right" which could be effected, although not specifically alleged in the complaint, is the re-enlistment opportunity. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971). The only challenge to the military determination was a general challenge to the discretionary powers vested in the commanding officer to determine what is in the best interest of the Tennessee Air National Guard. The respondent asserted in his complaint that the discretion rested in a commander to determine whether or not an enlisted member should be allowed to re-enlist was vague and overbroad. (Complaint, para. 10, 13; App. 22-23). This Court refused to uphold a similar attack on similar language when it was used as a basis for a discharge of a nonprobationary civil service employee in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). Here the alleged reason was that to refuse to accept the respondent's offer to re-enlist was "in the best interest" of the Tennessee National Guard. Kennedy had alleged that he was discharged "for such cause as will promote the efficiency of the service." Even in the face of an attack founded on an assertion that the discharge was effected because of the employee's exercise of First Amendment rights, the latter language was not found to be unconstitutionally vague. The respondent did not attack the decision of the military commander as it effected a traditional military purpose. The attack was founded on the idea that the discretion vested in a commander was so broad as to render any exercise of that discretion to be arbitrary and capricious. There is no allegation that the procedures established by law and regulation were not followed.

What is the potential injury to the respondent: In regard to the Tennessee National Guard as a state entity, the respondent alleged absolutely no injury. The technician position of the respondent was terminated by operation of law when his military membership ceased.

To what effect would judicial review interfere with the military: Should this Honorable Court adopt the view of the Sixth Circuit in the instant case and hold that the military must first litigate the threshold question of whether or not a particular decision was made for a military purpose, the petitioners envision a potential for great abuse of the judicial system by disgruntled servicemen who may seek judicial review of a decision made by a military superior. The litigation of the threshold question of the purpose for the decision would in most cases result in the litigation of the merits of the claim itself. The military could conceivably be forced to defend each of its decisions, at least to the extent of proving that a decision was made for a military purpose, rather than for a "secular" one. Thus, even utilizing the *Mindes* criteria, a military commander's decision to refuse to allow re-enlistment should not be reviewed—particularly under the facts of the case at bar as they now exist.

CONCLUSION

For the foregoing reasons the petitioners respectfully submit that the decision of the Court of Appeals of the United States for the Sixth Circuit should be reversed and the decision and order of the United States District Court for the Eastern District of Tennessee dismissing the complaint should be reinstated.

Respectfully submitted

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